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December 11, 2014

VIA CM/ECF

The Honorable Paul S. Diamond
United States District Judge
Eastern District of Pennsylvania
601 Market Street
Philadelphia, Pennsylvania 19106

Re: *Mylan Pharmaceuticals Inc. v. Warner Chilcott Public Ltd. Co., et al.*,
Civ. No. 12-3824 (Consolidated)

Dear Judge Diamond:

On behalf of Mylan Pharmaceuticals Inc. (“Mylan”), we write to bring to the Court’s attention a recent decision of the United States District Court for the Eastern District of Pennsylvania (Goldberg, J.) in *In re Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litigation*, MDL No. 2445 (“*Suboxone*”) as supplemental authority in support of Mylan’s Motion for Summary Judgment, Dkt. No. 553 and Mylan’s Opposition to Defendants’ Motion for Summary Judgment, Dkt. No. 588.¹

In *Suboxone*, putative classes of direct purchaser plaintiffs and end-user plaintiffs (collectively, “*Suboxone* Plaintiffs”) alleged that the defendant, Reckitt Benckiser, Inc. (“Reckitt”), a brand drug company, switched the market from Suboxone tablets to Suboxone film to avoid generic competition for the tablet product. On December 3, 2014, Judge Goldberg denied the *Suboxone* defendant’s motion to dismiss plaintiffs’ claims regarding product hopping. The Opinion and Order are attached for the Court’s convenience as Exhibits 1 and 2.

First, Judge Goldberg rejected Reckitt’s argument that introduction of a new product is per se lawful. *Suboxone* at 14-18 (citing, *inter alia*, Herbert Hovenkamp, Mark D. Janis & Mark A. Lemley, *IP and Antitrust*, § 21). Judge Goldberg concluded that claims that a brand drug company introduced a new product for the purposes of reducing generic competition, and took steps to achieve that end, are viable under federal antitrust law. *Suboxone* at 18-22. In reviewing the relevant case law, Judge Goldberg noted that the appropriate standard of review is

¹ Although Judge Goldberg’s decision comes on a motion to dismiss, it is relevant to the motions for summary judgment pending in *Mylan Pharmaceuticals v. Warner Chilcott Public Ltd. Co., et al.*, Civ. No. 12-3824 (Consolidated) (“*Doryx*”). Judge Goldberg’s discussion of the relevant law, including Third Circuit precedent, included cases for which a full factual record was before the court. See, e.g., *Suboxone* at 21 (citing *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005) and *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001)).



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the rule of reason analysis under *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001), “where the defendant’s procompetitive justifications are weighed against the anticompetitive results.” *Id.* (citing *Abbott Labs. v. Teva Pharms. USA, Inc.*, 432 F. Supp. 2d 408 (D. Del. 2006) (“*TriCor*”). The same standard should be applied in *Doryx*. Dkt. No. 553 at 37-40.

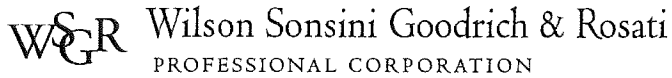
Next, Judge Goldberg discussed *TriCor*, a case in which the court denied defendant’s motion to dismiss and found that product hopping is a viable theory under the Sherman Act. 432 F. Supp. 2d at 421-22. Judge Goldberg noted that the *Suboxone* Plaintiffs’ factual allegations fell “somewhere between” the facts alleged in *TriCor* and those alleged in *Walgreen Co. v. AstraZeneca Pharmaceuticals L.P.*, 534 F. Supp. 2d 146 (D.D.C. 2008), a case relied upon by Reckitt and the *Doryx* Defendants.² *Suboxone* at 17; *see also* Defendants’ Motion for Summary Judgment, Dkt. No. 532 at 11, 16, 47. The key question, said Judge Goldberg, is “whether the defendant combined the introduction of a new product with some other wrongful conduct, such that the comprehensive effect is likely to stymie competition, prevent consumer choice and reduce the market’s ambit.” *Id.* at 18. He also noted that the question must be considered in light of the “unique characteristics of the pharmaceutical market[.]” *Id.* Ultimately, Judge Goldberg concluded that the *Suboxone* facts were closer to *TriCor* than *Walgreen* because “[t]he threatened removal of the [Suboxone] tablets from the market in conjunction with the alleged fabricated safety concerns could plausibly coerce patients and doctors to switch from tablet to film,” thus reducing consumer choice. *Id.* at 19.

As we have presented in our summary judgment motion, the evidence in *Doryx* shows that Warner Chilcott and Mayne withdrew *Doryx* capsules from the market prior to generic entry and took additional steps to convert prescriptions and switch the market to *Doryx* tablets, thereby reducing consumer choice. Dkt. No. 553 at 11-15, 40-42. These steps included a coordinated campaign in which Defendants spent millions of dollars buying back and destroying *Doryx* capsules as well as circulating marketing materials about the market switch to retailers, wholesalers, and physicians. *Id.*

Additionally, Judge Goldberg was not persuaded by Reckitt’s argument that its conduct was not exclusionary because a generic company could have competitively sold a generic *Suboxone* tablet even after it had withdrawn the brand tablet from the market. *Suboxone* at 21. Warner Chilcott and Mayne have made the same argument in *Doryx*.³ Defendants’ Motion for Summary Judgment, Dkt. No. 532, at 48-49. Judge Goldberg rejected that argument, stating that

² In *Walgreen*, the court dismissed plaintiffs’ claims in part because the defendant brand drug company had not withdrawn the old formulation of a drug upon introduction of a new formulation, and thus consumer choice was not reduced. 534 F. Supp. 2d at 150-52. Judge Goldberg found that Reckitt’s withdrawal of the prior formulation, plus other wrongful conduct, sufficiently distinguished *Suboxone* from *Walgreen*. *Suboxone* at 17-18.

³ The Third Circuit has rejected this argument, stating “[t]he test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market’s ambit.” *Dentsply*, 399 F.3d at 191.



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given the “market forces unique to the pharmaceutical industry,” *Suboxone* plaintiffs sufficiently alleged that generic substitution is a cost-efficient competition mechanism and Reckitt had thwarted this mechanism, thereby illegally excluding competition. *Suboxone* at 15, 21-22. Mylan has adduced substantial evidence in *Doryx* that supports the same conclusion. *See* Dkt. No. 553 at 50-53.

Dated: December 11, 2014

Respectfully submitted,

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